FILE
SEP 26
MICHAEL RODAK, J

No. 80-126

In the Supreme Court of the United States

OCTOBER TERM, 1979

OUTBOARD MARINE CORPORATION, PETITIONER

v.

PEOPLE OF THE STATE OF ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Clean Water Act preempts the federal common law of nuisance in respect of pollution of interstate and navigable waters.

2. Whether a state may invoke the federal common law of nuisance to remedy an in-state discharger's pollution of interstate and navigable waters.

3. Whether the court of appeals correctly permitted the State of Illinois to intervene as of right pursuant to Section 505(b)(1)(B) of the Clean Water Act, 33 U.S.C. 1365(b)(1)(B), in a suit brought by the federal government under the Act.

4. Whether a state may pursue independently its rights and remedies under the Clean Water Act and the federal common law of nuisance.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Discussion 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Ancarrow v. *City of Richmond*, 600 F. 2d 443 6

City of Milwaukee v. *People of the State of Illinois*, cert. granted, No. 79-408 (Mar. 17, 1980) 4

Committee for the Consideration of the Jones Falls Sewage System v. *Train*, 539 F. 2d 1006 ..... 3, 5

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 4

Illinois v. *City of Milwaukee*, 406 U.S. 91 ..... 3, 4, 5, 6

National Sea Clammers Ass'n v. *City of New York*, 616 F. 2d 1222, petitions for cert. pending, Nos. 79-1711, 79-1754, 79-1760 & 80-12 5

Parsell v. *Shell Oil Co.*, 421 F. Supp. 1275, aff'd mem., 573 F. 2d 1289 5

Page

Cases—Continued:

Reserve Mining Co. v. *EPA*, 514 F. 2d 492 ..... 3, 5

United States v. *General Motors Corp.*, 323 U.S. 373 4

United States v. *Ira S. Bushey & Sons*, 346 F. Supp. 145, aff'd, mem., 487 F. 2d 1393, cert. denied, 417 U.S. 976 5

Statutes and rules:

Clean Water Act, 33 U.S.C. 1251 *et seq.* 1, 4

Section 101(b), 33 U.S.C. 1251(b) 4

Section 505(a)(1)(A), 33 U.S.C. 1365(b)(1)(A) 2

Section 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B) 2, 3, 6

Refuse Act, 33 U.S.C. 407 1

Federal Rules of Civil Procedure:

Rule 24(a)(1) 2, 6

Rule 24(a)(2) 6

Rule 24(b) 6

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 619 F. 2d 623. The opinions of the district court (Pet. Apps. C and D) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1980. A petition for rehearing was denied on April 29, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on July 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the interlocutory decision of the court of appeals regarding the right of respondent State of Illinois to maintain a federal common law nuisance action and to intervene in an ongoing Clean Water Act suit brought by the United States concerning the same controversey.

1. In March 1978, the United States filed suit in the United States District Court for the Northern District of Illinois, seeking to remedy petitioner's past discharges of polychlorinated biphenyls ("PCB's") into North Ditch (a tributary feeding Lake Michigan), Waukegan Harbor, and Lake Michigan. The government asked the district court to order petitioner to dredge and dispose safely of the PCB-contaminated sediments and to pay civil penalties. Relief was sought pursuant to the Refuse Act, 33 U.S.C. 407; the Clean Water Act, 33 U.S.C. 1251 *et seq.*; and the federal common law of nuisance. The district court denied petitioner's motion to dismiss this suit (*United States* v. *Outboard Marine Corp.*, 12 E.R.C. 1346 (N.D. Ill. 1978)), and the parties are currently pursuing pretrial discovery in this action. Trial is expected to commence early next year.

In August 1978, respondent Illinois filed a similar action against petitioner based on the federal common law of nuisance, the Clean Water Act, and state law. The district court dismissed this suit (Pet. App. D-1 to D-4). In particular, the court held that although the Clean Water Act had not preempted the federal common law of nuisance, the federal common law did not govern suits by a state regarding pollution from an in-state source, even if that pollution had interstate effects (*id.* at D-3 to D-4). In addition, the court dismissed Illinois' Clean Water Act suit for failure to comply with the 60-day notice requirement set forth in 33 U.S.C. 1365(b)(1)(A) (see Pet. App. D-2 to D-3),[1] and it likewise dismissed the remaining state law claims for lack of jurisdiction (*id.* at D-4).

Relying primarily on Section 505(b)(1)(B) of the Act, 33 U.S.C. 1365(b)(1)(B), and Rule 24(a)(1) of the Federal Rules of Civil Procedure, Illinois thereafter moved to intervene in the federal government's suit against petitioner. The district court agreed that Section 505(b)(1)(B) gives any citizen or state an absolute right to intervene in a suit brought by the federal government "to require compliance" with the Act. It concluded, however, that the federal suit does not constitute an action "to require compliance," because the government sought merely to redress past violations rather than to achieve future compliance (Pet. App. C-2 to C-4). Accordingly, the district court denied the motion to intervene.

2. Illinois then appealed both the order dismissing its own suit and the order denying its motion to intervene in the federal suit. The court of appeals reversed (Pet. App. A-1 to A-20). The court first concluded that Illinois may

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[1]Illinois did not contest this ruling on appeal (Pet. App. A-3).

invoke the federal common law as a remedy against the pollution of interstate or navigable waters regardless of the location of the polluter. The court observed that in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court repeatedly emphasized that the federal common law of nuisance concerns the pollution of "interstate *or navigable* waters" (Pet. App. A-7 to A-8, A-11, quoting 406 U.S. at 99, 102, 104 (emphasis supplied)). The court of appeals pointed out that this broad application of the federal common law of nuisance is consistent with the intent of Congress reflected in the language and legislative history of the Clean Water Act and with the interstate nature of water pollution (Pet. App. A-8 to A-12). Moreover, the court rejected decisions of the Fourth and Eighth Circuits suggesting a narrower scope of the federal common law (Pet. App. A-12 to A-13). See *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492 (8th Cir. 1975); *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F. 2d 1006 (4th Cir. 1976). The court noted (Pet. App. A-13) that in any event

> [t]hose two decisions are distinguishable in that in each case the court found that the pollution had only an intrastate effect. Here, of course, the four states bordering on Lake Michigan are all affected * * *.

The court of appeals also held that Illinois had a right to intervene in the federal government's Clean Water Act suit. The court explained that Section 505(b)(1)(B) expressly provides for intervention in a suit brought by the United States to require compliance with the Act, including a suit concerning the clean up of current PCB pollution (Pet. App. A-17 to A-19). Such intervention, the court observed, was consistent with the Act's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

eliminate pollution" (Pet. App. A-19, quoting 33 U.S.C. 1251(b)).

DISCUSSION

1. Petitioner primarily contends (Pet. 5-17) that the Clean Water Act, 33 U.S.C. 1251 *et seq.*, preempts the federal common law of nuisance regarding the pollution of interstate and navigable waters. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). That issue is currently before the Court in *City of Milwaukee* v. *People of the State of Illinois*, cert. granted, No. 79-408 (Mar. 17, 1980). For the reasons stated in our amicus curiae brief in that case, we believe that the courts below correctly rejected petitioner's claim.[2] Nonetheless, because the issue is now pending before the Court, it may be appropriate to defer disposition of this petition pending the decision in *City of Milwaukee* v. *People of the State of Illinois, supra*.[3]

2. The other issues raised by petitioner do not warrant review by this Court. At the outset, we note that the court of appeals' decision is interlocutory in nature and that review is unwarranted at this time. See, *e.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1961). Indeed, further litigation may well moot some or all of the issues posed by petitioner.[4] In addition, development of the facts of this case will

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[2]A copy of our brief in *City of Milwaukee* has been sent to counsel for petitioner.

[3]We note that the decision below is interlocutory in nature and that the litigation concerning petitioner's discharge of PCB's is now ongoing in the district court. Accordingly, the Court could properly deny this petition, permitting the lower courts to apply the subsequent decision in *City of Milwaukee* in the first instance.

[4]For example, petitioner may prevail on the merits of one or both suits.

illuminate petitioner's contention (Question 2) regarding the scope of the federal common law of nuisance. In any event, as we briefly demonstrate below, the decision of the court of appeals is correct.

a. Petitioner argues (Pet. 17-23) that the federal common law of nuisance does not apply to suits between a state and a citizen of that state, even if the pollution affects interstate or navigable waters. But in *Illinois* v. *City of Milwaukee, supra*, which also involved the pollution of Lake Michigan, this Court repeatedly emphasized that the federal common law applies to the pollution of all "interstate or navigable waters." See 406 U.S. at 99, 102, 104. And, contrary to petitioner's suggestion (Pet. 21), application of the federal common law in this case does not depend on "the character of the parties." 406 U.S. at 105 n.6. In short, where, as here, plaintiffs allege that the pollution affects interstate and navigable waters, there is a federal common law remedy. Accord, *National Sea Clammers Ass'n* v. *City of New York*, 616 F. 2d 1222, 1233-1234 & n.35 (3d Cir. 1980), petitions for cert. pending, Nos. 79-1711, 79-1754, 79-1760 and 80-12; *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), aff'd mem., 573 F. 2d 1289 (2d Cir. 1977); *United States* v. *Ira S. Bushey & Sons,* 346 F. Supp. 145, 149 (D. Vt. 1972), aff'd mem., 487 F. 2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974).[5]

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[5]To be sure, as petitioner notes (Pet. 17-19), the court below disagreed with decisions of the Fourth and Eighth Circuits suggesting that federal common law does not apply to local pollution controversies involving no allegations of interstate effects (Pet. App. A-13). See *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492, 520-521 (8th Cir. 1975); *Committee for the Consideration of the Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006, 1008 (4th Cir. 1976). But, as the court of appeals further pointed out, *Reserve Mining* and *Jones Falls* "are distinguishable in that in each case the court found that the

b. Petitioner further contends (Pet. 24-28) that the court of appeals improperly permitted Illinois to intervene in the suit brought by the United States alleging petitioner's noncompliance with the Clean Water Act. Rule 24(a)(1) of the Federal Rules of Civil Procedure provides, however, that "anyone shall be permitted to intervene in an action * * * when a statute of the United States confers an unconditional right to intervene." Section 505(b)(1)(B) of the Clean Water Act, in turn, states that any citizen, including a state, "may intervene as a matter of right" in any action "to require compliance" with the standards and limitations set in accordance with the Act. See 33 U.S.C. 1365(b)(1)(B). And, as the court of appeals concluded, nothing in the broad language or legislative history of Section 505 suggests that Congress sought to preclude citizen intervention in a suit brought to remedy continuing noncompliance with the Act, merely because noncompliance is based on past discharges (Pet. App. A-18 to A-20). That decision does not conflict with any decision of this Court or of any court of appeals, and further review is unwarranted.[6]

c. Finally, petitioner claims that Section 505(b)(1)(B) precludes an independent citizen's suit where, as here, the federal government is already diligently prosecuting an action to secure compliance with the Act. Therefore, in

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pollution had only an intrastate effect" (Pet. App. A-13). See also *Ancarrow* v. *City of Richmond*, 600 F. 2d 443, 445 (4th Cir. 1979). Here, of course, Illinois and the federal government alleged that petitioner's discharges are affecting, *inter alia*, Lake Michigan—a body of water that this Court has expressly found to be governed by the federal common law of nuisance. See 406 U.S. at 105 n.6.

[6]Illinois also sought to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) and as a matter of discretion under Fed. R. Civ. P. 24(b). The court of appeals did not rule on these points (Pet. App. A-20).

petitioner's view, the court of appeals erroneously permitted Illinois both to intervene and to pursue its common law suit. But Section 505(b)(1)(B) merely precludes a citizen from bringing a suit "under [Section 505](a)(1)" of the Act when the government is already suing to secure compliance with the Act. See 33 U.S.C. 1365(b)(1)(B). Illinois' independent suit is, of course, based on the federal common law and thus is plainly not governed by the terms of Section 505(b)(1)(B).

CONCLUSION

The Court may wish to defer consideration of Questions 1 and 2 of the petition for a writ of certiorari pending the decision in *City of Milwaukee* v. *People of the State of Illinois*, cert. granted, No. 79-408 (Mar. 17, 1980). In all other respects, the petition should be denied.

Respectfully submitted.

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